819.

SUPREME COURT OF THE UNITED STATES.

No. 157.

WM. BAILY, PLAINTIFF IN ERROR,

vs.

WM. B. DOZIER.

IN ERROR TO THE CIRCUIT COURT U. S. FOR MISSISSIPPI, S. D.

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J. & G. S. GIDEON, printers.

WILLIAM BAILEY,
vs.
WILLIAM B. DOZIER.

Pleas before the honorable Samuel J. Gholson, district judge of the United States, at a circuit court of the United States, held at the town of Jackson, in and for the ninth circuit and southern district of Mississippi, at the May term, in the year of our Lord one thousand eight hundred and forty-three.

Be it remembered that heretofore, to wit, on the 5th day of April, A. D. 1841, the following writ of summons ad respondendum, issued out of the clerk's office of the court aforesaid, in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern district of Mississippi:

The President of the United States, to the marshal of the southern district of Mississippi, greeting:

We command you, without delay, to summon Will. B. Dozier and John D. Fatheree, citizens of the State of Mississippi, that they be and appear at the circuit court of the United States, to be held at the city of Jackson, in and for the southern district of Mississippi, on the first Monday of May next, to answer to William Bailey, a citizen of the State of Virginia, of a plea of trespass on the case, to his damage six thousand dollars, and that they do file their plea or defence, with the clerk of said court, on or before the meeting of the same, or judgment will be given against them by default; and have then there this writ.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, the 5th day of April, A. D. 1841, and in the 65th year of the independence of the United States.
[L. S.]

W. BURNS, *Clk.*
By GEO. W. MILLER, *D. C.*

Marshal's return.—Executed on W. B. Dozier the 5th April, 1841, by leaving a copy at his usual place of abode.

F. S. HUNT, *Marsh.*
By A. S. SHRIEK, *Dep'ty.*

And on the same day of suing out the writ aforesaid, the plaintiff, by his attorneys, French and Burwell, filed his declaration herein against the said defendants, in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern district of Mississippi:

Circuit court, May term, 1841.

William Bailey, who is a citizen of the State of Virginia, by attorneys, complains of Will. B. Dozier and John D. Fatheree, who are citizens of the State of Mississippi, in custody, &c., of a plea of trespass on the case.

For this, that heretofore, to wit, on the eighteenth day of January, written Jan'y, in the year 1838, at Paulding, to wit, at the district aforesaid, the said Will. B. Dozier made his certain bill of exchange, in writing, of that date, and then and there directed said bill of exchange to one Pierson Lewis, at Jackson, Mississippi, by the name and description of Mr. Pierson Lewis, and thereby then and there requested the said Lewis to pay, twelve months after date of said bill of exchange, to John D. Fatheree, who is an alien and resident of the republic of Texas, or order, the sum of two thousand six hundred and seventy dollars, for value received; and then and there delivered said bill of exchange to the said Fatheree, and the said Fatheree, by the name of J. D. Fathree, then and there indorsed and delivered said bill of exchange to plaintiff; which said bill of exchange the said Lewis, afterwards, to wit, on the day and year aforesaid, at , to wit, at the district aforesaid, upon sight thereof accepted.

And the plaintiff avers that afterwards, to wit, on the 21st day of January, the year 1839, at to wit, the district aforesaid, the said bill of exchange was duly presented and shown to the said Lewis for payment thereof, and payment of the said sum of money in the said bill of exchange specified was then and there duly required. But neither the said Pierson Lewis, nor the said Dozier, nor the said Fatheree, nor any other person or persons, on behalf of the said Lewis, did or would at the said time, when the bill of exchange was so presented and shown for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but then and there wholly neglected and refused so to do; and thereupon the said bill of exchange was then and there duly protested for non-payment. Of all which premises the said defendants afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, had notice; by means whereof the said defendants then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified, when thereunto afterwards requested; and being so liable, they the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, undertook, and then and there faithfully promised the said plaintiff, to pay him the said sum of money in said bill specified, when thereunto afterwards requested; and whereas, also, the said defendants afterwards, to wit, on the first day of February, in the year 1839, at the district aforesaid, were indebted to the said plaintiff in the further sum of three thousand dollars and cents, for so much money by the said plaintiff before that time lent and advanced to, and paid, laid out, and expended for the said defendants, and at their special instance and request; and also in the further sum of three thousand dollars, for other money by the said defendant before that time had and received, to and for the use of the said plaintiff; and being so indebted, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said last mentioned sums of money when they, the said defendants, should be thereunto afterwards requested.

Yet the said defendants, not regarding their said several promises and undertakings, have not yet paid the said plaintiff the said several sums of money, or any or either of them, or any part thereof, (although often requested so to do.) But to pay the same, or any part thereof, to the said plaintiff the said defendants have hitherto wholly failed and refused, and still do refuse so to do, to the damage of the said plaintiff of six thousand dollars; and therefore he brings his suit, &c.

FRENCH & BURWELL,
Pl'ff's att'y.

And the said defendant, William B. Dozier, in his own proper person, comes and says, that this court ought not to have or take further cognizance of the action aforesaid, as to him said Dozier, because he says that the said bill of exchange, in the plaintiff's declaration mentioned, was drawn in the State of Mississippi, to wit, at Paulding, in Mississippi, payable at Jackson, in the said State of Mississippi, and that the drawer and endorser and acceptor thereof, were, and yet are citizens and resident in the State of Mississippi; and said bill is not a foreign bill of exchange; and this the said William B. Dozier is ready to verify; wherefore he prays judgment, whether this court can or will take further cognizance of the action aforesaid.

And for further plea in this behalf, the said William B. Dozier says, that this court ought not to have or take further cognizance of this action, because he says that the said William Bailey, the plaintiff, is a citizen of the State of Mississippi, to wit, of the county of Rankin, in said State, and this he is ready to verify; wherefore he prays judgment, whether this court can or will take further cognizance of the action aforesaid.

MAYS & CLIFTON, *for def't.*

Sworn to and subscribed before me, this 28th of April, 1841.

GEO. W. MILLER, *D. C.*

And the defendant, William B. Dozier, by attorney, comes and defends the wrong and injury, when, &c., and for plea says, actio non, because he says, he did not promise and undertake in manner and form as the said plaintiff hath above thereof in this behalf declared against him; and of this he puts himself upon the country, &c.

MAYS & CLIFTON, *for def't.*

And the plaintiff doth the like.

BURWELL & HOWARDS,
For pl'ff.

And afterwards, to wit, at the said May term of the court aforesaid, to wit, on the fourth day of May, in the year of our Lord one thousand eight hundred and forty-three, until which time this cause was legally continued, came as well the said plaintiff, by his said attorneys, as the said defendant, Dozier, by his said attorneys; and on motion of the said plaintiff, by his attorneys, it is ordered, that this suit be discontinued as to the defendant, Fatheree.

And a jury being called, came, to wit: Henry C. Daniel, William Wing, William Fairbanks, Moses Foster, J. M. West, George Fletcher, A. L. Stewart, Benjamin Albertson, J. L. McManus, D. W. Connelly, E. B. Davis, and Lewis Reno, who being impannelled, tried and sworn to speak the truth concerning the matter within contained, upon their oaths do say, that they find for the defendant, Dozier, upon the issue joined.

Bill of exceptions filed by the plaintiff.

This case coming on for trial on the fourth day of the present term of this court, before the honorable Samuel J. Gholson, presiding, the plaintiff read in evidence to the jury the following bill of exchange and protest thereof, upon which this action is founded, to wit:

$2,670. PAULDING, 18*th January*, 1838.

Twelve months after date of this my first and only bill of exchange, pay to the order of John D. Fatheree, two thousand six hundred and seventy dollars, for value received, and place the same to account of

Your ob't s'vt,

WILL. B. DOZIER.

Mr. PIERSON LEWIS,
Jackson, Mississippi.

Endorsed—J. D. FATHEREE.
Accepted—PIERSON LEWIS.

Copy of protest.

UNITED STATES OF AMERICA,
State of Mississippi, Hinds county, sct:

By this public instrument of protest, be it known, that on this 21st day of January, 1839, at the request of Wm. P. Grayson, esq'r, cash., the holder of the original bill of exchange, a true copy whereof is hereunto annexed, I, David H. Dickson, justice of the peace, acting as notary public ex officio, residing in the town of Jackson, in said county, qualified according to law, with said bill in my possession, went to the office of discount and deposite of the Mississippi Union Bank, presented and demanded payment of said bill of exchange of Pierson Lewis, in person, the acceptor of said bill; which was refused by him, saying, that he had not the means of paying the same at that time.

Whereupon I, the said justice of the peace, acting as notary public ex officio, do hereby publickly and solemnly protest the said bill of exchange, as well against the drawer thereof, as against the acceptors and endorsers, and all who are or may be concerned therein, for all exchange, re-exchange, costs, charges, damages, and interest, suffered or to suffer, for the non-payment of said bill.

Thus solemnly done and protested.

DAVID H. DICKSON, *J. P.*,
Ex officio notary public.

The plaintiff then introduced David H. Dickson, the notary, as a witness, who being first duly sworn, stated on oath, that on the day the

bill fell due, he went to the Union Bank in Jackson, and demanded payment of said bill of the teller of said bank, and was answered by him that there were no funds in the bank to pay said bill. Witness did not know where said Pierson Lewis, the acceptor, lived; but on coming out of the bank a person was pointed out to him as said Lewis, the acceptor of the bill. Whereupon witness demanded payment of said Lewis, who answered that he could not pay the same. Whereupon witness protested said bill for non-payment, as well against the acceptor, as all other parties to the same, and on that day deposited in the post-office at Jackson, notice of the dishonor of said bill, in season to go out by the next mail, directed to Paulding, Mississippi, for said Will. B. Dozier, the defendant, which is the residence and post-office of said Dozier, who is the drawer of said bill, advising him of the non-payment thereof by the acceptor, and that the holder looked to him for payment.

On his cross examination witness stated, that after he left the bank, a person was pointed out to him by the plaintiff as Pierson Lewis, of whom he made demand of payment, which was refused; that the protest now attached to said bill of exchange is not the original protest made out by him on the day of said above named demand.

That on making demand of said bill as above stated, he made out a protest and attached the same to the bill by wafer, and delivered the bill and protest to the plaintiff; that afterwards the plaintiff sent a messenger to him, stating that said protest would not do, and requesting another; and thereupon witness tore the bill away from it, and made out another, differing from the first, and delivered it, also annexed to said bill, to said messenger. That near a year afterward the plaintiff applied, in person, to said witness, and stated that said second protest was also materially defective, and requested witness to make out another; and witness then again separated said bill from said second protest, and made out a third protest, and after wafering the bill thereto, delivered the said bill and protest to the said plaintiff, which last is the protest now read to the jury, and the two rents, or mutilations on said bill, designate the parts at which it was wafered to each of said protests.

That the original protest differed from the second, and the third from both the preceding.

Whereupon the defendant, by attorney, moved the court to exclude said bill of exchange from the jury, for the want of valid protest; which motion, after argument, the court sustained, and instructed the jury that the plaintiff could not sustain his action on the bill of exchange, unaccompanied by a protest.

To which plaintiff's counsel *accepted*, and tendered this bill of exceptions before the jury retired from the box, and prayed that the same may be signed, sealed, and made a part of the record in this cause; which is done accordingly.

S. J. GHOLSON. [SEAL.]

Therefore it is considered by the court that the said plaintiff take nothing by his bill, but for his false clamor be in mercy, &c.; and that the said defendant, Dozier, go hence, without day, and recover of the

said plaintiff his costs and charges by him about his defence in this behalf expended.

UNITED STATES OF AMERICA,
Southern district of Mississippi:
Circuit court U. S.

I, William A. Brown, clerk of said circuit court, do hereby certify, that the foregoing nine pages contain a full, true, and complete transcript of the record of the judgment in the case therein named, as the same now remains of record in my office.

In testimony whereof I have hereunto set my hand and affixed the [L. S.] seal of said court at Jackson, this 11th day of January, A. D. 1844.

W. H. BROWN, *Clk.*

UNITED STATES OF AMERICA, *ss:*

To William B. Dozier, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, on the second Monday in January next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the ninth circuit and district of Mississippi, wherein William Baily is plaintiff and you are defendant in error, to shew cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the honorable Samuel J. Gholson, one of the judges of the circuit court of the United States for the southern district of Mississippi, this 6th day of February, in the year of our Lord one thousand eight hundred and forty-four, and in the 68th year of the independence of the United States.

S. J. GHOLSON.

Executed on W. B. Dozier, March 22d, 1844.

ANDERSON MILLER,
Marshal so. dis't Miss'i.
By GEO. B. ADAMS, *Deputy.*

Marshal's fees—Service $1 50
Mileage 9 00

$10 50

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judge of the circuit court of the United States for the southern district of Mississippi, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between William Baily, plaintiff, and William B. Dozier, defendant, a manifest error hath happened, to the great damage of the said